

A GS Gill Sdn Bhd v Descente, Ltd and another appeal

COURT OF APPEAL (PUTRAJAYA) — SUIT NO D7(D5)-22-491 OF
1997

B GOPAL SRI RAM, LOW HOP BING AND ABDULL HAMID
EMBONG JJCA
17 AUGUST 2008

C *Civil Procedure — Contempt of court — Order for committal, application for —
Chairman of defendant disobeying terms of injunction obtained by plaintiff —
Plaintiff successful in obtaining reliefs sought — Whether Chairman's contempt
was merely 'de minimis' — Whether plaintiff's pursuit of contempt remedy
smacked of vindictiveness rather than enforcement*

D *Civil Procedure — Damages — Award of — Trial judge making an award of
damages instead of directing an assessment of damages — Whether trial judge
ought to have directed an assessment of damages instead*

E *Civil Procedure — Injunction — Damages — Undertaking as to damages —
Power of trial court to enforce undertaking as to damages — Whether such power
discretionary — Whether discretion correctly exercised*

F *Evidence — Burden of proof — Balance of probabilities in civil cases — Two
versions of dispute presented to trial court — Plaintiff's version of dispute more
probable than defendant's — Whether trial judge entitled to accept plaintiff's
version*

G [The oral judgment of the learned High Court judge, T Selenthiranathan,
is published immediately after this Court of Appeal judgment for ease of
reference.]

H The plaintiff was the owner of the 'Le Coq Sportif' trademark in respect of
sports apparel. It entered into three licence agreements ('the agreements') with
the defendant — a sports goods retailer — giving the defendant the right to
manufacture and retail goods carrying the Le Coq Sportif mark. The
I agreements restricted the defendant from exporting the goods outside
Malaysia and Singapore. During the currency of the first and second
agreements, the plaintiff found Le Coq Sportif goods manufactured in
Malaysia in the Japanese market. After the third licence agreement had been

entered into, the plaintiff decided to engage the services of one Isaac Leung ('Isaac') to see if the defendant was in fact exporting Le Coq Sportif goods. Isaac then visited the defendant's premises on two occasions to obtain samples. On his second visit, Isaac was able to purchase some US\$10,395 worth of Le Coq Sportif goods for which he paid US\$5,000 straightaway. The goods were, at Isaac's request, shipped by the defendant to an address in Hong Kong. The defendant billed Isaac's company in Hong Kong. Thereafter, the plaintiff issued a writ against the defendant claiming a breach of the third licence agreement. The defendant obtained an ex parte Anton Pillar injunction, which it executed on the same day it terminated the third licence agreement with the defendant. The plaintiff's action was subsequently heard in the High Court, wherein the plaintiff also applied to punish the defendant's director for contempt. The defendant filed a counterclaim against the plaintiff. The High Court held for the plaintiff and dismissed the defendant's counterclaim. The High Court also dismissed the plaintiff's application to punish the defendant's director for contempt. Both plaintiff and defendant appealed to the Court of Appeal.

Held, dismissing both appeals with costs:

- (1) The High Court judge had two versions before him. He found the plaintiff's version more probable and accepted it. He was perfectly entitled to do that. The Court of Appeal, having reviewed the evidence, was entirely in agreement with the High Court judge. When viewed objectively, the plaintiff's explanation for what it did and the way in which it did it appeared more probable (see paras 6 & 8).
- (2) There was nothing to the defendant's complaint that its employee — Kalwant — had no authority to deal with the goods. The defendant had not established that Kalwant's alleged lack of authority was sufficiently or at all brought home to Isaac. In any event, there was evidence to show that the sale to Isaac, and the export to Hong Kong was approved by PW6, the defendant's managing director. PW6 issued the relevant receipt for the money paid by Isaac for the export to Hong Kong. Thus, even if Kalwant lacked authority to enter into the transaction that he did, his act was adopted by someone (PW6) who clearly had the defendant's authority to enter into the transaction in question (see para 9).
- (3) The defendant's contention that there had been an error occasioning a serious miscarriage of justice because the trial judge had mistakenly referred to PW6 as DW6, was inconsequential and had no adverse impact upon the ultimate result (see paras 11–12).

- A (4) There was no substance to the defendant's argument that the trial judge ought to have directed an assessment of damages rather than make the award himself as he did. The Court of Appeal was satisfied that there was sufficient evidence on which it was open for the trial judge to make the award he did. There is a strong element of discretion in the making of an award of damages coupled with a belief in the mind of the trier of fact in the truth of the evidence adduced before him or her (see para 13).
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- C (5) The court's power to permit the enforcement of an undertaking as to damages is discretionary in nature. In the instant case, the High Court had refused to direct an assessment as to damages despite the fact that the Anton Pillar injunction was later set aside. The judge had exercised his discretion against the defendant because the defendant had violated its solemn promise not to export the subject goods in circumstances that required the plaintiff to resort to investigative methods at its own cost. This was an entirely proper exercise of discretion by the learned judge. There was no appealable error in the way in which he exercised his discretion (see para 18).
- D
- E (6) The appeal could be disposed off on the more simple and obvious ground that the contempt, if any, was *de minimis* when considered in the light of the totality of the circumstances in the instant case. The main object of the plaintiff was to obtain damages from the defendant for the breach by it of the relevant licence agreement. That it got. The plaintiff also obtained the consequential relief it asked for. Thus the fact that the subject goods were sold during the currency of the injunction assumed little importance since damages were awarded for the sale in any event. Pursuing the contempt remedy therefore smacked of vindictiveness rather than enforcement. Since the remedy of attachment of the person is discretionary, the refusal of the learned judge to find guilt on the part of the defendant's chairman was correct having regard to the very special facts of the instant case (see para 19).
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- G (7) The decision of the learned judge turned essentially on questions of fact based on the credibility of witnesses. The learned judge was correct in his decision in respect of each of the witnesses (see paras 20 & 22).
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Observation:

It is axiomatic that in civil litigation a party is bound by the evidence of the witnesses he chooses to call. If the evidence of his witness is adverse to his case then his opponent is entitled to rely on that evidence in support of his own case. This is encapsulated in the phrase: 'Their evidence is our evidence.' (see para 10); *M Ratnavale v Lourdenadin* [1988] 2 MLJ 371 referred.

I

[Bahasa Malaysia summary]

Plaintif merupakan pemilik tanda dagangan 'Le Coq Sportif' untuk pakaian sukan. Ia telah memasuki tiga perjanjian perlesenan ('perjanjian tersebut') dengan defendan — penjual runcit barangan sukan — yang memberikan defendan hak untuk membuat dan menjual secara runcit barangan yang membawa tanda Le Coq Sportif. Perjanjian-perjanjian tersebut menghalang defendan daripada mengeksportkan barangan tersebut ke luar Malaysia dan Singapura., Sepanjang tempoh perjanjian-perjanjian pertama dan kedua, plaintif menemui barangan Le Coq Sportif yang dibuat Malaysia di pasaran Jepun. Selepas perjanjian perlesenan ketiga dimasuki, plaintif memutuskan untuk melantik perkhidmatan Isaac Leung ('Isaac') untuk melihat sama ada defendan sememangnya mengeksport barangan Le Coq Sportif tersebut. Issac kemudian telah melawat premis defendan dua kali untuk mendapatkan sampel. Pada lawatan keduanya, Isaac dapat membeli barangan Le Coq Sportif sejumlah US\$10,395 yang mana dia telah membayar terus US\$5,000. Barangan tersebut, atas permintaan Issac telah dihantar melalui kapal oleh defendan ke alamat di Hong Kong. Defendan telah menghantar bil kepada syarikat Issac di Hong Kong. Selepas itu, plaintif telah mengeluarkan writ terhadap defendan mendakwa berlaku pelanggaran perjanjian perlesenan ketiga. Defendan telah mendapatkan injunksi ex parte Anton Pillar, yang telah dimasukinya pada hari yang sama dia menamatkan perjanjian perlesenan ketiga dengan defendan. Tindakan plaintif kemudiannya telah didengar di Mahkamah Tinggi, di mana plaintif juga memohon untuk menghukum pengarah defendan kerana penghinaan. Defendan telah memfailkan tuntutan balas terhadap plaintif. Mahkamah Tinggi memutuskan bagi pihak plaintif dan menolak tuntutan balas defendan. Mahkamah Tinggi juga menolak permohonan plaintif untuk menghukum pengarah defendan kerana penghinaan. Kedua-dua plaintif dan defendan telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak kedua-dua rayuan dengan kos:

- (1) Hakim Mahkamah Tinggi mempunyai dua versi di hadapannya. Beliau mendapati versi plaintif lebih berkemungkinan dan menerimanya. Beliau sememangnya layak berbuat demikian. Mahkamah Rayuan, setelah meneliti semula keterangan, bersetuju secara keseluruhannya dengan hakim Mahkamah Tinggi. Apabila dilihat secara objektif, penjelasan plaintif untuk apa yang ia lakukan dan cara ia melakukannya lebih berkemungkinan (lihat perenggan 6 & 8).
- (2) Tiada apa-apa dalam aduan defendan yang pekerjaanya — Kalwant — tidak mempunyai kuasa untuk berurusan dengan barangan tersebut. Defendan tidak membuktikan bahawa pengataan yang Kalwant tiada

- A kuasa adalah memadai atau menuding ke arah Isaac. Dalam apa keadaan, terdapat keterangan untuk menunjukkan bahawa jualan kepada Isaac, dan eksport ke Hong Kong telah diluluskan oleh PW6, pengarah urusan defendan. PW6 telah mengeluarkan resit berkaitan untuk wang yang dibayar oleh Isaac untuk eksport ke Hong Kong.
- B Oleh itu, meskipun Kalwant tiada kuasa untuk memasuki transaksi yang telah dilakukannya, tindakannya telah dibenarkan oleh seseorang (PW6) yang jelas mempunyai kuasa defendan untuk memasuki transaksi yang dipersoalkan (lihat perenggan 9).
- C (3) Hujah defendan bahawa tiada kesilapan yang telah mengakibatkan kegagalan melaksanakan keadilan kerana hakim perbicaraan terkhilaf semasa merujuk PW6 sebagai DW6, adalah tidak penting dan tiada kesan buruk terhadap hasil akhirnya (lihat perenggan 11–12).
- D (4) Hujah defendan tidak berasas bahawa hakim perbicaraan patut mengarahkan penaksiran ganti rugi dan bukan membuat award oleh beliau sendiri seperti yang telah dilakukannya. Mahkamah Rayuan berpuas hati bahawa terdapat keterangan yang mencukupi yang mana ia adalah terbuka untuk hakim perbicaraan membuat award yang telah dilakukannya. Terdapat elemen yang kukuh dalam membuat award untuk ganti rugi ditambah pula dengan kepercayaan terhadap pembuat fakta tentang kebenaran keterangan yang dikemukakan di hadapannya (lihat perenggan 13).
- E (5) Kuasa mahkamah untuk membenarkan penguatkuasaan untuk satu aku janji berhubung ganti rugi adalah bersifat budi bicara. Dalam kes ini, Mahkamah Tinggi enggan mengarahkan penaksiran berhubung ganti rugi meskipun pada hakikatnya injunksi Anton Pillar tersebut telah diketepikan akhirnya. Hakim telah menggunakan budi bicara beliau terhadap defendan kerana defendan telah melanggar janjinya untuk tidak mengeksport barangan yang dipersoalkan dalam keadaan yang menghendaki plaintif mengambil langkah melakukan siasatan dengan kosnya sendiri. Ini pada keseluruhannya adalah penggunaan budi bicara yang wajar oleh hakim yang bijaksana. Tiada kesilapan yang boleh dirayukan dalam cara beliau telah menggunakan budi bicara beliau (lihat perenggan 18).
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- I (6) Rayuan tersebut boleh diselesaikan atas alasan yang lebih mudah dan jelas bahawa penghinaan tersebut, jika ada, adalah *de minimis* apabila dipertimbangkan berdasarkan keseluruhan keadaan dalam kes ini. Tujuan utama plaintif adalah untuk mendapatkan ganti rugi daripada defendan untuk pelanggaran olehnya terhadap perjanjian perlesenan yang berkaitan. Itu diperolehinya. Plaintif juga memperoleh relief tambahan yang dipohonnya. Oleh itu fakta bahawa barangan yang dipersoalkan telah dijual sepanjang tempoh injunksi dikatakan tidak begitu penting memandangkan ganti rugi telah diawardkan untuk

jualan tersebut dalam apa keadaan. Dengan meneruskan remedi penghinaan dengan itu meletakkan perasaan dendam dan bukan penguatkuasaan. Memandangkan remedi penahanan seseorang itu adalah berdasarkan budi bicara, keengganan hakim yang bijaksana untuk mendapati kesalahan di pihak pengerusi defendan adalah betul dengan mengambilkira fakta-fakta istimewa kes ini (lihat perenggan 19).

- (7) Keputusan hakim yang bijaksana adalah berasaskan terutamanya tentang persoalan fakta berdasarkan kebolehpercayaan saksi-saksi. Hakim yang bijaksana adalah betul dalam keputusannya berhubung setiap saksi-saksi tersebut (lihat perenggan 20 & 22).

Penelitian:

Ia tidak boleh disangkal bahawa dalam litigasi sivil satu pihak adalah terikat oleh keterangan saksi-saksi yang dia pilih untuk panggil. Sekiranya keterangan saksinya bercanggah dengan kesnya maka lawannya berhak untuk bergantung kepada keterangan tersebut untuk menyokong kesnya sendiri. Ini telah dinyatakan dalam ungkapan: 'Their evidence is our evidence.' (lihat perenggan 10); *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 dirujuk.]

Notes

For cases on application for order for committal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1822–1840.

For cases on award of damages generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2259–2298.

For cases on balance of probabilities in civil cases, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 370–371.

For cases on damages under injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2924–2932.

Cases referred to

Clarke v Edinburgh Tramways [1919] SC 35 (refd)

F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry [1975] AC 295 (refd)

Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302 (refd)

M Ratnavale v S Lourdenadin [1988] 2 MLJ 371 (refd)

Ryan v Jarvis [2005] UKPC 27 (refd)

Appeal from: Civil Suit No D7(D5)22–491 of 1997 (High Court, Kuala Lumpur)

Jagjit Singh (Melvin Selvam with him) (Jagjit Singh & Co) for the appellant in Civil Appeal No W-02–977 of 2005.

- A *Linda Wang (Choy Sook Yee and Sia Teng Teng with her) (Tay & Partners) for the respondent in Civil Appeal No W-02-977 of 2005.*
Linda Wang (Choy Sook Yee and Sia Teng Teng with her) (Tay & Partners) for the appellant in Civil Appeal No W-02-116 of 2004.
Jagjit Singh (Melvin Selvam with him) (Jagjit Singh & Co) for the respondent in Civil Appeal No W-02-116 of 2004.
- B

Gopal Sri Ram JCA:

- C [1] There are two appeals before us. One is by the defendant in the court below. It is against the decision of the learned judge entering judgment for the plaintiff and dismissing the defendant's counterclaim. The other is by the plaintiff against the order of the judge dismissing its application to have the defendant's principal officer committed to prison for contempt. The facts of this case are simple enough.
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- E [2] The defendant is a well known sports goods retailer. It sells all sorts of sports apparel as well. There is a range of sports apparel under the name of 'Le Coq Sportif'. The plaintiff is the owner of that trademark. It entered into three agreements with the defendant under the terms of which it gave to the defendant the right to manufacture and retail goods carrying the Le Coq Sportif mark. They are dated 16 December 1991 ('the first licence agreement'), 4 July 1995 ('the second licence agreement') and 26 August 1996 ('the third licence agreement'). But there was an important restriction imposed on the defendant. It could only market the goods in question within Malaysia and Singapore. Exporting the goods outside these two countries was strictly prohibited. Each of the three agreements contained a clause to that effect. Absent the plaintiff's licence, it was unlawful for the defendant to do any of the things permitted by the respective licence agreements. At this point
- F I would mention three matters. Although the first licence agreement was expressed to be effective for only a period of 12 months, that is to say, from 1 January 1992 to 31 December 1992, it appears to have been consistently renewed until the second licence agreement was entered into. Next, although the second licence agreement expired on 31 December 1995, the plaintiff
- G permitted the defendant to continue as before until the third licence agreement had been executed. Last, under the terms of the respective agreements, in the event of a non-renewal of the licence by the plaintiff, the defendant had 6 months to dispose of the licensed goods that it had in its hands.
- H

- I [3] Now, it is in evidence that during the currency of the first and second agreements problems arose between the parties. The plaintiff had found Le Coq Sportif goods manufactured in Malaysia in the Japanese market. If such goods were available in Japan, they must in all probability have come from

the defendant. For, there were no other sources from which the goods could have come. Not unnaturally, the plaintiff was most concerned about this and about granting a fresh licence to the defendant whom it suspected of having violated a most important term of the existing agreement. After the third licence agreement had been entered into, the plaintiff decided to put the defendant to the test. In 1996, it engaged the services of one Isaac Leung through the firm of M/s Rouse & Co of Hong Kong to assist it to see if the defendant was in fact exporting Le Coq Sportif goods. Isaac Leung came to Kuala Lumpur on two occasions. He first came on 8 August 1996. He went to the defendant's premises with the object of obtaining samples and quotations for Le Coq Sportif goods marketed by the defendant. But he was unable to obtain any. He next came on 30 December 1996, that is to say, on the eve of the expiry of the third licence agreement. On this occasion he was able to obtain samples. He also purchased about US\$10,395 worth of Le Coq Sportif goods for which he paid US\$5,000 straightaway. The subject goods were, at Isaac Leung's request, shipped by the defendant to an address in Hong Kong. The defendant billed Isaac Leung's company in Hong Kong. Thereafter, the plaintiff then issued writ against the defendant on 16 June 1997 claiming a breach of the third licence agreement. On the same day it obtained an ex parte Anton Pillar injunction. Three days later, that is to say, on 19 June 1997, the plaintiff faxed to the defendant a letter terminating the third licence agreement and on the same day executed the Anton Pillar order on the defendant. Pausing, you may well ask why the plaintiff had to terminate the third licence agreement when, by its terms it lapsed on 31 December 1996. The answer is that although it had lapsed, the parties continued to deal with each other even after the date of its expiry. Neither could be heard to say that the agreement had earlier lapsed. If either had tried, he would have been estopped from making the assertion. The plaintiff had therefore to put an end to the contract it had with the defendant.

[4] Returning to the mainstream, after the Anton Pillar proceedings, there were several interlocutory matters that were heard and disposed of by the High Court, including an unsuccessful application by the plaintiff to have a director of the defendant punished for contempt. Following an exchange of pleadings, which included a counterclaim by the defendant, and other pre-trial steps, the action came on for trial. After hearing viva voce evidence, the learned trial judge, adjourned the matter for a short while and then, entirely to his credit, delivered an ex tempore judgment in which he held for the plaintiff and granted it the relief claimed. He also dismissed the defendant's counterclaim. His judgment has been attacked by the defendant on a number of grounds. However, it is clear that the only issue before us is whether the learned judge judicially appreciated the evidence in holding that the defendant had violated the terms of the third licence agreement.

A [5] Before us the defendant put its case in this way. First, the sale by the
defendant to Isaac Leung and the shipping of the relevant goods to Hong
Kong was induced by the plaintiff. Hence, the plaintiff could not rely on its
own wrong to allege that the defendant had acted in breach of the third
licence agreement. See, *Gimstern Corporation (M) Sdn Bhd & Anor v Global*
B *Insurance Co Sdn Bhd* [1987] 1 MLJ 302. Second, the defendant's employee,
one Kalwant, had no authority to deal with Le Coq Sportif goods. Hence, the
defendant was not bound by his act of exporting the goods in question to
Hong Kong. Third, the learned judge had failed to adequately evaluate the
evidence of PW6 who, though the defendant's managing director, was called
C as the plaintiff's witness. Fourth, although the judge had found for the
plaintiff, he ought to have directed an assessment of damages and not made
an award himself. Fifth, as the plaintiff's act in terminating the agreement was
unlawful, the judge ought to have found for the defendant and entered
D judgment on its counterclaim which is based on the contention that the
defendant had a reasonable or legitimate expectation to obtain a renewal of
the third licence agreement. The plaintiff having deprived the defendant of
this expectation is liable to the latter in damages.

E [6] Let me take the first point. Now, the learned judge who tried the case
had two versions before him. That given by the plaintiff to which I have
already adverted when dealing with the factual narrative and that of the
defendant. He found the plaintiff's version more probable and accepted it.
F He was perfectly entitled to do that. And having reviewed the evidence I find
myself entirely in agreement with him. I will explain why.

[7] The defendant's argument is premised on the assumption that the
plaintiff went to great lengths — expending money and other resources — for
G the sole purpose of finding a good reason to terminate the third licence
agreement. But if it wanted not to deal with the defendant any further, all it
need have done is to wait for the third licence agreement to lapse and then
forthwith refuse a renewal. Such a course would have saved it time, trouble
H and the costs of litigation. When viewed thus, the defendant's version rings
untrue on a balance of probabilities.

[8] The plaintiff's case, by contrast, is that it had come across evidence of
an export by the defendant in violation of the relevant licence agreement and
I therefore decided to investigate the matter further. It wanted crystal clear
evidence in its hands before it moved against the defendant. That is why it
engaged Isaac Leung and went to the trouble of detecting whether the
defendant was open to exporting the subject goods. After all, it had had a
fairly long standing relationship with the defendant and it was wont to make

any serious allegation without firm evidence in its hands. When viewed objectively, the plaintiff's explanation for what it did and the way in which it did it appears more probable.

[9] That brings me to the defendant's second point. It does not appear to have been established by the defendant that Kalwant's alleged lack of authority was sufficiently or at all brought home to Isaac Leung. In any event, there is evidence to show that the sale to Isaac Leung, including the factum of export to Hong Kong was approved by PW6, the defendant's managing director. For, it was she who issued the relevant receipt for the money paid by Isaac Leung for the export to Hong Kong. Thus, even if Kalwant lacked authority to enter into the transaction that he did, his act was adopted by someone who clearly had the defendant's authority to enter into the transaction in question. So there is really nothing in the second point.

[10] I will now take the third point. One of the witnesses called by the plaintiff to prove its case was PW6, the defendant's managing director. She was, of course, a witness with an inherent bias in the defendant's favour. In the course of her cross examination she testified that the sale to Isaac Leung was an over-the-counter transaction that took place in Kuala Lumpur and that it was not an export. The defendant says that her evidence supports its case to show that there was indeed no export at all. Now, it is axiomatic that in civil litigation a party is bound by the evidence of the witnesses he chooses to call. If the evidence of his witness is adverse to his case then his opponent is entitled to rely on that evidence in support of his own case. This is encapsulated in the phrase: 'Their evidence is our evidence'. So, in *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371, Hashim Yeop A Sani SCJ (later Chief Justice of Malaya) said:

There is no legal prohibition against a plaintiff calling a defendant to be his witness. The position in law is that the matter should be left to the discretion of the trial judge according to the circumstances of the case.

As a matter of practice, this is of course seldom done for the simple reason that when the defendant is called as a plaintiff's witness, his evidence is to be treated as the evidence of the plaintiff. Hence the plaintiff runs a risk every time he elects to take such a course of action.

[11] The defendant's real complaint here is that the learned judge was confused in his mind when he evaluated PW6's evidence as he kept referring to her in his judgment as 'DW6'. The learned judge had therefore assumed in his mind that PW6 was a defence witness when in fact she was the plaintiff's witness. There has therefore been an error occasioning a serious miscarriage of justice.

- A [12] I have very anxiously examined PW6's evidence in its totality and tested it against the independent contemporaneous documents and against the probabilities of the case. Having done so, I am entirely satisfied that the error by the learned judge in referring to PW6 as DW6 has had no adverse effect upon the plaintiff's case. However much PW6 may have denied that
- B the defendant had exported the subject goods to Hong Kong, the defendant's own documents, including her own document — the receipt issued to Isaac Leung — told a very different story. At best she was an unreliable witness. I have therefore no doubt in my mind that a reasonable tribunal similarly
- C circumstanced as the learned judge and properly directing itself would have held for the plaintiff based on the totality of the evidence produced in the court below. Accordingly, the error complained of is inconsequential and has had no adverse impact upon the ultimate result.
- D [13] The defendant's fourth ground may be shortly dealt with. The issue here is whether the learned judge should have made the award himself. The complaint is that he ought to have directed an assessment. Having examined the record provided to us, I am satisfied that there was sufficient evidence on which it was open for the judge to make the award he did. At the end of the
- E day, there is a strong element of discretion in the making of an award of damages coupled with a belief in the mind of the trier of fact in the truth of the evidence adduced before him or her. There is therefore no substance in the fourth point.
- F [14] The defendant's fifth point is really linked to its first. Put together, it means that the judge should have found for the defendant and not the plaintiff and that his contrary finding is wrong. I have already dealt with the probabilities of the case earlier in this judgment. The learned judge having
- G come to the conclusion that the plaintiff had proved its case on a balance of probabilities — which is also the view I hold — it was necessary for him to dismiss the counterclaim. This is a case in which it was either the plaintiff or the defendant who was entirely to blame for what happened. Hence the result that obtained.
- H [15] Before I deal with the plaintiff's appeal, there is one final matter that I think that must be addressed. It has to do with the judge's refusal to enforce the plaintiff's undertaking as to damages by directing an assessment despite the fact that the Anton Pillar injunction was later set aside. Some complaint was made about this.
- I [16] It must be stated at once that the power of a court to permit the enforcement of an undertaking as to damages is, like all matters of equitable jurisdiction, discretionary in nature. As *Spry on Equitable Remedies* (3rd Ed) says:

The better view appears to be that when, in an undertaking of this nature, reference is made to an order as to damages it is intended simply to ensure that there will be an obligation on the part of the plaintiff to abide by any order that is subsequently made directing him to make a pecuniary recompense to the defendant for any inconvenience or loss that he may have suffered.

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[17] In *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, Lord Diplock said:

The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts; but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so ...

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[18] On the facts of the present case, the finding by the learned judge that the defendant had violated its solemn promise not to export the subject goods in circumstances that required the plaintiff to resort to investigative methods at its own cost — because the defendant had concealed it from the plaintiff until the Isaac Leung transaction brought it to the surface must have led the learned judge to exercise discretion against the former. This is an entirely proper exercise of discretion by the learned judge. Indeed, I am unable to detect any appealable error in the way in which he exercised discretion. As such I do not think it open to this court to interfere.

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[19] As for the plaintiff's appeal, the complaint is that the learned judge failed to punish the defendant's chairman for failure to comply with the injunction on two grounds, both irrelevant in law. For my part, I find it quite unnecessary to decide upon the validity of the reasons given by the learned judge for dismissing the plaintiff's application to commit the alleged contemnor. In my considered judgment this appeal may be quite readily be disposed off on the more simple and obvious ground that the contempt, if any, was de minimis when considered in the light of the totality of the circumstances here. The main object of the plaintiff was to obtain damages from the defendant for the breach by it of the relevant licence agreement. That it got. It also obtained the consequential relief it asked for. So, the fact that the subject goods were sold during the currency of the injunction assumes little importance since other remedy, namely, damages were awarded for the sale in any event. Pursuing the contempt remedy therefore smacks of vindictiveness rather than enforcement. Since the remedy of attachment of

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A the person is discretionary, the refusal of the learned judge to find guilt on the part of the defendant's chairman is correct having regard to the very special facts of this case.

B [20] Returning to the defendant's appeal and drawing the threads together, it is clear that the decision of the learned judge turned essentially on questions of fact based on the credibility of witnesses. The role of this court in a case such as the present is well settled. As stated by Lord Hoffman in *Ryan v Jarvis* [2005] UKPC 27 when delivering the advice of the Board in an appeal from Antigua & Barbuda:

C It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

D [21] In *Clarke v Edinburgh Tramways* [1919] SC 35, Lord Shaw of Dunfermline set out the approach an appellate court should adopt to a case as the present:

E When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

I [22] Having given these appeals my most anxious consideration, I am satisfied that the learned judge was correct in his decision in respect of each of them. I would therefore dismiss both appeals. The defendant must pay the costs of its appeal to the plaintiff. Likewise, the plaintiff must pay the costs

of its appeal to the defendant. For convenience, the deposits in court shall be refunded to each party. The orders of the High Court are hereby affirmed.

A

[23] My learned brothers Low Hop Bing and Abdull Hamid Embong JJCA have seen this judgment in draft and have expressed their agreement with it.

B

Descente Ltd v GS Gill Sdn Bhd

C

HIGH COURT (KUALA LUMPUR) — SUIT NO D7(D5)-22-491 OF
1997
25 AUGUST 2005

D

Legislation referred to

Evidence Act 1950 s 115

Rules of the High Court 1980 O 45(7)

*Asmet Nasaruddin (Linda Wang & Ooi Aik Hin with him) for the plaintiff.
Jagjit Singh (Melvin Selvam with him) for the defendant.*

E

T Selventhiranathan J:

[1] The plaintiff in this case is Descente Limited, a company incorporated under the laws of Japan. The defendant is GS Gill Sdn Bhd, a company incorporated under the laws of Malaysia.

F

[2] The plaintiff and the defendant entered into a business relationship over a period of time, commencing from the 1 November 1991, as evidenced by an agreement entered into between the parties which was effective from 1 November 1991 to 31 December 1994, a period of three years and two months.

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[3] This agreement, with the necessary modifications, was advanced in a second licence agreement entered into between the parties for the period 1 January 1995 to 31 December 1995. However, the parties signed the agreement on 4 July 1995. That notwithstanding, it is clear from the evidence that has been adduced, that the parties continued dealing with each other on the basis of the first licence agreement, between the expiry of that first licence agreement and the signing of the second licence agreement. That was why the second licence agreement was to encapsulate the period of one year from 1 January to 31 December 1995.

I

- A [4] The parties then entered into a third licence agreement on 26 August 1996, encompassing the period 1 January 1996 to 31 December 1996.
- B [5] The plaintiff contended that the defendant had breached the terms of the third licence agreement and therefore, by a letter dated 19 June 1997, which was transmitted by facsimile to the defendant, the plaintiff purported to terminate the licence agreement with immediate effect.
- C [6] The reason contained in that notice of termination was that the defendant had breached art 9.7 in the third licence agreement, whereby the defendant had exported the products in question to Hong Kong contrary to an express prohibition against such export contained in the agreement.
- D [7] I hasten to add that under the licence agreement, ie, the third licence agreement, the defendant was given the exclusive right to distribute and market the products of the plaintiff bearing the Le Coq Sportif trademark and device within the territory as defined in that agreement. That territory comprised the countries of Malaysia and Singapore.
- E [8] The details of the breach of the licence agreement were purportedly the purchase of the trademarked products by one Isaac Leung Tat Kwong, PW7, from the premises of the defendant at Jalan Tuanku Abdul Rahman, Kuala Lumpur, on 30 December 1996, and subsequently sent to Hong Kong by the defendant.
- F [9] It was Isaac Leung's evidence that he had visited the premises of the defendant on 8 August 1996 where he had met an employee of the defendant, one Kalwant Singh, and had discussed the possibility of the defendant exporting the Le Coq Sportif products to Hong Kong.
- G [10] This was followed by a subsequent visit on 30 December 1996, during which visit Isaac Leung alleged that he had not only met Kalwant Singh, but also the chairman and director of the defendant, Dato GS Gill, DW1, and Ms Premjeet Gill, DW6, during that visit, and another employee.
- H [11] During this visit Isaac Leung stated that he had discussed the possibility of the defendant exporting the licenced products to Hong Kong. He was informed that this was possible but, according to him, Kalwant Singh had told him that if subsequent exports were to be done, it would have to be done under another company associated with the defendant company by the name of Gillace Sdn Bhd.
- I

- [12] Isaac Leung also stated that DW1, Dato GS Gill, had told him that one had to be careful about such export, because the defendant was not allowed to export the products under the third licence agreement. A
- [13] Be that as it may, the upshot of it was that Isaac Leung paid US\$5,000 in cash for the products which he purchased from the defendant. He was given a receipt for this deposit that he had made, and subsequently the products were received by Isaac Leung as well as the representative of Rouse & Company International Hong Kong Limited. B
- [14] The products which were purchased by Isaac Leung were under a company which he had set up for this purpose called Octopus Industrial Company in Hong Kong. The products were sent to the company in Hong Kong at that address and, at Isaac Leung's behest, they were diverted to a firm of solicitors where they were received. C D
- [15] There is no dispute that the products were in fact sent to Hong Kong, as evidenced in exh P20 and related exhibits. Exhibit P20 shows 11 different items of various products which were sent, and each item consisted of 50 of those products; in other words, there were 550 such products in all. E
- [16] Isaac Leung collected one of each as samples when he made the deposit payment on 30 December 1996, and subsequently the balance payment was sent by telegraphic transfer to the defendant's account at Standard Chartered Bank, Jalan Ampang branch, Kuala Lumpur. The balance that was sent included the freight charges which were imposed by the defendant. F
- [17] The defendant's stand In relation to this transaction were two-pronged. One, that the defendant had no knowledge of this transaction and that it arose from a conspiracy hatched between Isaac Leung and Rouse & Company and to a certain extent even the solicitors who were instructed by Rouse & Company in Hong Kong on the one hand; and Kalwant Singh, the employee of the defendant, on the other hand. G H
- [18] It was contended that Kalwant Singh had been bribed to enter into this transaction because he had no authority whatsoever to sell Le Coq Sportif products or goods. I
- [19] The witnesses for the defendant claimed that his authority only extended to McGill products, and therefore this was done without the knowledge or authorisation of the defendant company.

- A [20] To my mind this was post-occurrence rationalisation. I say this simply because the documents which are contemporaneous at the time speak for themselves. All the documents relating to this transaction were on the letterhead of the defendant company, ie, GS Gill Sdn Bhd, the payment was in US dollars, and it was made into the account of the defendant company.
- B
- C [21] The contention of the defendant that this was an over-the-counter transaction and that it was a service that the defendant was extending to Isaac Leung at his request cannot hold water, in the face of the contemporaneous documents, some of which were not only signed by some of the employees of the defendant company, but they were also signed by the managing director, Ms Premjeet Gill, PW6, and the accountant of the defendant company, Ms Toe Lay Hoon, PW9. The balance was shown in the records of the company, the defendant company, as monies which were owing to the defendant company.
- D
- E [22] If, as the defendant contended, that this was a mere over-the-counter sale transaction, then it demolishes the defendant's first argument that Kalwant Singh was in league with Isaac Leung and Rouse & Company, as well as the solicitors from Hong Kong, to set this whole matter up.
- F [23] As background to this episode, one has to refer to the earlier correspondence between the defendant company and one wholly owned subsidiary of the plaintiff, Torubion Limited, incorporated in Japan. The defendant company had largely carried out communications with Torubion, which it treated as an agent of the plaintiff.
- G [24] It may, perhaps, be apt at this juncture to deal with one of the objections that was taken, as to the locus standi of the plaintiff to bring this action, stating that it was Torubion which should have brought this action and not Descente Limited.
- H [25] I find that contention is without basis. Furthermore, the defendant is estopped from raising this under s 115 of the Evidence Act 1950, as estoppel operates against the defendant. The defendant had treated Torubion as to all intents and purposes as an agent of the plaintiff in this regard, and It is the plaintiff who is the rightful owner of the trademark and device in Malaysia.
- I [26] Going back to what had transpired between the parties. Prior to the third licence agreement, evidence was led that the plaintiff was not happy with the manner in which the defendant was controlling the production of the licensed goods in Malaysia, in that considerable quantities of such goods which had been made in Malaysia had found their way into the Japan market.

[27] The defendant gave assurances that it had nothing to do with these incidents of Malaysia-made goods which were the plaintiffs licensed products having found their way into Japan. In fact, DW1, Dato' GS Gill, did say that there was no way in which the defendant could control people who had bought these products, and if they found their way into Japan, or for that matter, any other place outside the territory, the territory being the countries of Malaysia and Singapore

A

B

[28] This is acceptable because the defendant could not be expected to have 100 per cent control over the subcontractors, and suppliers of the licensed products to prevent their going out. However, it would appear that the plaintiff must have entertained doubts as to whether or not the defendant itself was indulging in activities which resulted in the licensed products finding their way into markets outside the licensed territory. Hence, the plaintiff mounted what I would term as a sting operation which, to my mind, was in legitimate protection of its vested right in the licensed product.

C

D

[29] Learned counsel for the defendant went to great lengths to say that the plaintiff mounted this sting operation in order to get out of renewing the licence agreement with the defendant. With respect, I am unable to agree.

E

[30] The evidence shows that the first licence agreement stretched over a period of three years and two months until 31 December 1994. However, before that period, or before the life of the licence had expired, the plaintiff had already raised doubts in relation to the defendant being involved in exports out of Malaysia.

F

[31] In this context, I hasten to say that the doubts were not in the defendant being involved directly, but that the defendant was not exercising sufficient control over the suppliers and subcontractors.

G

[32] The evidence also shows that the defendant wanted the licence to be valid for a longer period than one year at a time. The second licence agreement stretched over one year.

H

[33] The defendant was of the view that this was not satisfactory and had repeatedly asked the plaintiff to give a longer period for the licence. The plaintiff responded by saying that unless the plaintiff was assured or guaranteed that the defendant would exercise greater control over the licenced products within the territory, it could not accede to such request.

I

[34] It was the stand of the defendant that the third licence agreement expired on 31 December 1996, and therefore, pursuant to that licence

A agreement, the defendant was entitled to sell off the stock it had over a period of six months until 30 June 1997, in accordance with the third licence agreement.

B [35] The plaintiff, on the other hand, contended that the third licence agreement was in effect beyond the 31 December 1996 by virtue of the dealings between the parties, which had proceeded as if the licence agreement had been extended.

C [36] It is my finding of fact that the third licence agreement was in force by virtue of the conduct of the parties up to the time it was terminated on 19 June 1997. The evidence is overwhelming in this regard.

D [37] First, all I need to do is refer to the monthly report which was sent by the defendant to the plaintiff showing the sales of the licenced products which had taken place from January 1997 until May 1997. If one were to look at the last two monthly reports, ie, exhs P167 and P168, at the portion headed 'D inventory', it shows beyond a shadow of a doubt that the inventory between April and May increased overall. If the defendant was only involved in selling off the stock in trade, there should have been a decrease in inventory and not an increase.

F [38] I do concede that there are certain items which show a slight decrease. However, taken overall, there is an increase, and specific items show an increase. Therefore, this is not the act of a party which can contend that the licence agreement came to an end upon its expiry on 31 December 1996.

G [39] Added to that is the facsimile transmission from DW3, Mr Christopher Lam, an employee of the defendant, to the plaintiff on 19 March 1997. This is exh P57, the contents of which clearly show that it was within the ken of the defendant that the licence agreement was to be renewed, and this letter clearly inveigled the plaintiff to give some assurance of that.

H [40] I find further evidence of this in exh D144, which is the defendant's own exhibit, which was a facsimile transmission of 19 June 1997 to the plaintiff, wherein DW3, Christopher Lam, states as follows:

I As I have planned ahead as far as six months where production is concerned, materials have been purchased and they are under production. I do not know what I am going to do with all those goods.

[41] Then there is a further exh D142 which was from DW1, Dato GS Gill himself, to Mr Oshima of Torubion, dated 20 June 1997. By this facsimile transmission the sender, inter alia, invited Mr Oshima or anyone else '... to

come down to check all our records and if you can find anything that we have done against Torubion, you can fire us'. A

[42] This clearly shows that up to that point the defendant was treating the third licence agreement as being effective but for the notice of termination of 19 June 1997. B

[43] Moving further on the facts. The plaintiff obtained Anton Piller orders on 17 June 1997 and 1 July 1997. Pursuant to the first Anton Piller order, it raided the defendant's premises. The raid was carried out properly. It was in fact a search of the premises because there is in evidence that one of the persons present on behalf of the plaintiff on 19 June 1997 saw a box which was described as being one foot square being taken out from the premises. C

[44] Pursuant to the order, that person could have insisted that the box not be taken out, but it is in evidence that PW6, Premjeet Gill, refused access to that box. Therefore, we do not know what the contents of that box were, and I make no finding on that. D

[45] I also make no finding on the fact that there was a large room on the second floor of the premises to which access was denied. E

[46] I state these two instances in passing because during the course of the trial it was made to appear as if the plaintiff and the plaintiffs representatives had acted in a very high-handed manner in searching the premises of the defendant. F

[47] Any search of this nature will in its wake bring curiosity among those who are around, particularly in a busy thoroughfare as Jalan Tuanku Abdul Rahman, which is also a shopping area. However, the conduct of the plaintiffs representatives in the search cannot be said to be anything but proper. It was carried out in a very cordial manner, I believe, to the extent that PW6, Premjeet Gill, offered some drinks, coffee I believe, to Ms Linda Wang and another person there. G H

[48] Subsequent to these two Anton Piller orders, the defendant applied to set aside the same vide encls 18 and 21 in the file. I

[49] The plaintiff, on the other hand, commenced committal proceedings against DW1, Dato GS Gill, for having acted in defiance of those two orders. This was on the basis that despite the search of the defendant's premises and

A the carting away of the Le Coq Sportif products, the defendant had continued selling these products, as there was evidence which showed the same.

B [50] The enclosure in respect of the committal proceedings was encl 72 in the file. When these three enclosures came to be heard before me, Encik Asmet, counsel for the plaintiff, was of the view that encl 72 should be heard first, and that the respondent therein, ie Dato' GS Gill, should purge his contempt for having disobeyed the two Anton Piller orders as a director of the defendant company.

C [51] Mr Jagjit Singh on the other hand, learned counsel for the defendant, insisted that encls 18 and 21 should be dealt with first in their order of chronology.

D [52] I did intimate to the parties at that juncture that apart from encl 72, which involved the committal proceedings which could be taken separately, the other two enclosures, ie 18 and 21, could be taken at the trial of this action as the trial dates had already been fixed and the trial was to commence in the following month of February last year.

E [53] Learned counsel for the defendant during the proceedings relating to those enclosures made an impassioned plea for the trial to proceed expeditiously on account of the fact that DW1 was a person of advanced years and he had been waiting for this matter to be disposed of.

F [54] I accept that. I would also like to say, by way of explanation, that the file in this matter was not in my court from the beginning. It had been in Commercial Court 5, and I was given to understand that when the trial was about to commence, the learned counsel for the defendant had taken objection to the learned judge in that court (Dato' Kang Hwee Gee J) hearing the matter, and asked him to recuse himself, which the learned judge did.

G [55] As a result of that, this very bulky file was transferred to my court for hearing, and it had to take its place beside other files which had also been transferred to my court in relation to pre-2000 matters. However, the transfer was effected sometime in 2002. But these applications on behalf of the defendant in encls 18 and 21 had been made and were pending. The application in encl 72 was also made. All these three enclosures had not been heard and disposed of in Commercial Court 5. Therefore, they were carried over to my court.

I [56] I would have thought that had the defendant been anxious to proceed with the trial of the matter, then the better course would have been for

encls 18 and 21 to have been taken during the course of the trial where parol evidence was to be adduced, and such evidence would have been more complete than the affidavit evidence, which the court was constrained to consider when deciding encls 18 and 21.

A

[57] Be that as it may, I proceeded to hear those applications over a period of time, at the end of which I allowed the applications, ie to set aside the Anton Piller orders of 17 June and 1 July 1997.

B

[58] My reasons in doing so were simple. The Anton Piller orders had been obtained contrary to the Rules of the High Court 1980 and the practice direction, I believe it was 1 of 92, which had been issued in relation to the filing of affidavits in Bahasa Malaysia.

C

[59] The affidavit of PW1, Masato Hirooka, had been affirmed on 13 June 1997 in the English language. It was signed, I believe, in kenji characters, and there was nothing in the jurat to show that that affidavit had been translated to the deponent in the Japanese language, or that he understood the English language. Further, no Bahasa Malaysia version of the affidavit was filed.

D

[60] I also bore in mind that Dato' Haidar bin Mohd Noor, who was the judge in Commercial Court 5 at the material time, had on a similar ground upheld the objection of the defendant to the same affidavit. That matter had gone on appeal to the Court of Appeal, which in turn had upheld the decision of the learned judge.

E

[61] I therefore was of the view that on this technicality the applications of the defendant in encls 18 and 21 should be allowed with costs.

F

[62] In the normal course of events, pursuant to the undertaking which is given by the plaintiff in relation to the obtaining of an injunction to pay damages to the aggrieved party should the injunction be set aside, there would be an order for the assessment of damages. Learned counsel for the defendant wanted such assessment to be made before the registrar forthwith, and for the defendant to be paid the damages so assessed.

G

H

[63] I, however, made no order in respect of prayer 2 in those two enclosures, ie encls 18 and 21, for the assessment of damages because of the concerns that learned counsel for the defendant had voiced in relation to the trial not proceeding expeditiously earlier. The pleadings also clearly disclosed that there was a counterclaim for damages by the defendant. Therefore, it was not only expedient, but to exercise commonsense to have the whole matter determined during the trial. That was why I did not order an assessment of damages by the registrar at that juncture.

I

- A [64] Moving on to encl 72. As the Anton Piller orders of 17 June and 1 July 1997 had been set aside, and as they had been obtained on the basis of a defective affidavit, therefore the committal proceedings against DW1, in his capacity as the director of the defendant, could not stand. For that reason, I dismissed the committal proceedings with costs.
- B [65] An additional reason was that it appeared from the cause papers that the Anton Piller orders had been served on the defendant company marked 'Attention of Dato' GS Gill'. Order 45(7) of the Rules of the High Court 1980 enjoin that where execution is to be sought against any party pursuant
- C to an order served on it, there should be personal service of that order.
- D [66] I found as a fact that there had been no personal service of the two Anton Piller orders on the respondent in encl 72, a director of the defendant company, and as such the application for committal proceedings on that ground had to fail as well.
- E [67] Subsequent to the search of the defendant's premises and the carting away of all the items, as revealed in the search list, other licensed products were left behind. They were not removed.
- F [68] The evidence adduced on behalf of the plaintiff shows that subsequent sales of the licensed products did take place until as late as April 1998. Therefore, it would appear that the defendant had not suffered damage as a result of the Anton Piller orders because the defendant continued to trade in the licensed products. However, it is my finding that the defendant should have ceased so trading on 19 June 1997.
- G The third licence agreement, as I have earlier said, extended into 1997, and in this regard, although learned counsel for the defendant went to great pains to impress upon the court that the third licence agreement expired on 31 December 1996, his own letter to Dato' GS Gill, as chairman of the defendant, which is exh D53B, dated 9 October 1995, shows that at that point in time he was of the view that the first licence agreement dated 16 December 1991 was valid and subsisting in relation to differences that the
- H defendant had had with the manufacturer of Le Coq Sportif products in the form of a company called Procut Garment Manufacturing Sdn Bhd ('Procut').
- I [70] Therefore, this document of the defendant itself shows that that was the stand that the defendant had taken, or counsel for the defendant had taken, in relation to the first licence agreement, and that that advice was accepted by the defendant, as is evidenced by related correspondence between the defendant and Torubion, as to whether action should be taken against Procut.

[71] As the question of the exportation of the licenced products was very hotly disputed by the defendant through his counsel, I will deal with that at greater length.

A

[72] It was the stand of the defendant that Kalwant Singh was a renegade, as far as the defendant was concerned, because he was prepared to accept bribes from Isaac Leung to put the defendant in the predicament in which the defendant found itself.

B

[73] Let us examine the evidence. The calling card which Kalwant Singh handed over to Isaac Leung with his name on it had the defendant company's name on it. In other words, it was the defendant's calling card with Kalwant Singh as executive on it.

C

[74] Then there is the disclaimer in exh D144 by Christopher Lam that Kalwant Singh had no authority to handle the sale of Le Coq Sportif products. However, the issue of Kalwant Singh being bribed by Isaac Leung, I believe, was abandoned. That notwithstanding, the question arises as to whether there is any evidence of such bribing or collusion between Kalwant Singh and Isaac Leung and related parties.

D

E

[75] It cannot be gain said that Isaac Leung did not know Kalwant Singh from Adam. Isaac Leung is from Hong Kong. Kalwant Singh is from Malaysia. There has been no evidence of any connection between them or their having met prior to 8 August 1996.

F

[76] Then we have exh D142 from Dato' GS Gill to Mr Oshima of Torubion. This is what he had to say as of 20 June 1997 in relation to Kalwant Singh:

G

I have just come back to the office and I am a little surprised of what has happened. I have checked up the whole matter. This man, Kalwant, who was mentioned in the report has nothing to do with Le Coq Sportif. His job is to sell McGill equipment. All that he was trying to do was to show that he was doing a lot.

H

[77] To me, this, coming from the chairman of the employer, meant that Kalwant Singh was an over enthusiastic employee; nothing more, nothing less. That letter goes on to say:

This was just plain talk. All the goods which have been sold to this fellow in Hong Kong were taken from the retail shop and these goods were meant for retail.

I

I am surprised that my name has been brought in to say to be careful about shipment. I have always warned my staff that Le Coq Sportif goods and Adidas goods cannot be shipped outside Malaysia and Singapore.

A [78] Again:

From the report which you have seen I was informed that the fellow who came to see Kalwant paid him some under-table money. With the result all the signed papers were done by Kalwant and nobody else.

B I am really more than surprised of what has happened because your legal people and auditors have seen and checked all our books, sales, purchases and cash memos. It is not our intention to cheat Torubion at ali. This has been a sad part this has happened without my knowledge nor my daughter's- knowledge as this was done by the retail shop and of course, Kalwant has talked to the Hong Kong chap how big he was.

C

[79] Pausing at this juncture, it is my finding of fact that PW6, Premjeet Gill, did have knowledge of this transaction because the documents, ie the exhibits relating to the Hong Kong transaction, were signed by her, at least some of them, and they were further signed by the accountant as well. These documents found their way into the books of the defendant, and it is therefore not within the power of the defendant to say it had no knowledge. Kalwant Singh was its-employee, and it has to accept responsibility for the acts of its employee. These acts were carried out in the shop, which are the normal business premises of the defendant company. There was nothing untoward in this episode for Isaac Leung to think otherwise.

D

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F

[80] Going further. There is again an exhibit of the defendant itself, which is exh D143, again written by DW1, Dato' GS Gill, to Mr Yoshiji Masuda on 6 February 1998. This was a post-event letter. I quote from this:

Now coming to this problem, where this chap bought 50 sets of tracksuits from our retail department downstairs, of which I swear to you I was not aware at all.

G

[81] The chairman of the defendant company stated here that there were only 50 sets of tracksuits. Exhibit P20 shows there were 550 sets, which is 11 times that.

H

[82] By this time DW1 would have been well advised as to what had transpired. He would have been able to see matters for himself. His daughter, DW6, was in a position to advise him, together with Christopher Lam, I believe DW3, and the accountant, DW9. Yet this was what was stated by the defendant, and it is to my mind a self-serving letter which was intended to play down what had taken place.

I

[83] Going on from there, again in exh D143, this is what he states: A

In the retail section we have tourists from all over the world who come and purchase all their- requirements because, as you know, Malaysian sports goods are duty-free. The salesman who attended to the Hong Kong man has admitted to our lawyers that he was bribed to send the goods to Hong Kong, which was without my knowledge at all. Since then this salesman has been sacked. B

[84] It is pertinent to note that at this point of writing exh D143, DW1 had or was possessed of knowledge and information that. Kalwant Singh had admitted to his, DW1's, lawyers that he was bribed to send the goods to Hong Kong. C

[85] If that was so, evidence could have been forthcoming from his lawyers that Kalwant Singh so stated. There is no affidavit from any lawyer to the effect that Kalwant Singh made such an admission. D

[86] Then it says Kalwant Singh was sacked. However, exh P136, which was given by the defendant to the plaintiff, shows that Kalwant Singh resigned in August 1997. There is a world of difference between resigning from one's post and being sacked. E

[87] It may well be that post-event an attempt has been made to make Kalwant Singh appear the villain of the piece acting in cahoots with Isaac Leung. However, there is no evidence to show this. Coupled with that is the fact that Kalwant Singh, with his admission, would have become a prime witness for the defendant. However, what did the defendant do to secure the attendance of Kalwant Singh for the trial? F

[88] It is in the evidence of the person who was required to locate Kalwant Singh, I believe he was the adjuster, and he had put in his, report the various attempts in the year 2004 when he embarked upon his odyssey, as it were, to locate Kalwant Singh. By that time the ground was cold. G

[89] These are events which had happened in June 1997. It behoves the defendant to have taken steps at that time to have either had an affidavit from Kalwant Singh affirmed or to have kept track of Kalwant Singh to make sure that he came to this trial to give evidence of the purported bribery of himself by Isaac Leung. H

[90] With respect, the evidence which was led on behalf of the defendant to explain the failure of the defendant to call Kalwant Singh militates against I

A the defendant's case. Because of the time taken for the case to come to trial, the defendant should have acted with alacrity, particularly so when the defendant wanted this case disposed of speedily, to have tried to locate Kalwant Singh, and not have waited so long, when he was the main plank in the defence and counterclaim to support the defendant's case.

B
C [91] In relation to whether this was an act of exporting the goods to Hong Kong or not, the defendant's own witness, DW4, Ng Yew Toh, was very categorical in his evidence-in-chief to say that if a transaction in Malaysia was carried out in US dollars, then applying the practice of the trade, it must be for export purposes only. If it was an act of retail, in other words, a sale over the counter as contended for by the defendant, then the transaction would have to be in Ringgit Malaysia, because it is clear under the law that transactions within the country have to be conducted, normal transactions, in Ringgit Malaysia.

D
E [92] For instance, I cannot purchase goods in a shop in Malaysia and use US dollars or pounds sterling. I can take judicial notice of this. Because the shopkeeper will tell me, 'Please go to a money changer and change it into Malaysian currency to buy this'. But it is in the defendant's own evidence, through DW4, that this was an act of export.

F [93] During the search of the defendant's premises some other documents were also discovered which were in relation to sending what were described as samples of the Le Coq Sportif goods to a company called Lenric Limited in West Sussex, United Kingdom.

G [94] The defendant's explanation for this was that Lenric wanted samples to see what the defendant was capable of producing by way of those goods. Therefore, as the defendant was in a hurry to have the same dispatched, if I remember correctly, DW1, Dato' GS Gill said that the high commissioner himself had called him to ask for this to be expedited. Therefore, he sent this off.

H [95] However, evidence was adduced by the defendant's witnesses that the goods could have been sent without the Le Coq Sportif device and trademark on it. In this context, I believe the licence agreement, exh P9, clearly stated as to the goods being manufactured under the control of the plaintiff. Therefore, one wonders whether, even if they were samples that were sent, whether it would not behave the defendant to obtain the approval of the plaintiff to send this off because essentially it was a licensed good that the

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defendant was dealing with, and the proprietary interest in that device, in the trademark device, belonged to the plaintiff. However, not very much turns on that, as to whether it was a sample or whether it was sent off as a sample and whether it was exported. It may well come within the prohibition of export, despite being a sample, within the terms of the licence agreement, exh P9.

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[96] It may not be amiss for me at this juncture to examine the salient provisions of the third licence agreement, exh P9. By art 2.1 of that agreement, the plaintiff granted to the defendant the exclusive right in the territory, as defined, to promote and distribute the products of the plaintiff and to use the trademarks of the plaintiff for that purpose alone and for no other.

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[97] By art 4, all material used in the manufacture of the licensed products were to meet with the quality standards consistent with the reputation of the licensor, ie, the plaintiff, and were to be subject to the quality control procedure as set out in arts 5 and 7.

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[98] While the licence agreement was in force, by art 9 the defendant was required to promote and distribute the licenced products, and was to give monthly returns and provide further information on a quarterly basis.

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With this in mind, one can see that the defendant continued to treat the licence agreement in 1997 as being in force by virtue of complying with art 9 in the reports that were sent to the plaintiff by DW3, Christopher Lam.

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[99] By art 9.7 the defendant was prohibited from exporting directly or indirectly any product outside the territory, and it guaranteed that it would take all reasonable steps to ensure that its distributors, affiliates and/or subcontractors would refrain from exporting, directly or indirectly, the licenced products outside the territory.

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[100] Under this same art 9.7, the defendant as licensee was required to permit the inspection or investigation of its compliance with its obligations under art 9.7 by an authorised representative or representatives of the plaintiff as licensor at any time. One may even say that the purchase of the goods by Isaac Leung on 30 December 1996 could be argued to have been pursuant to this right which the defendant gave the plaintiff. Therefore, nothing sinister should be read into that activity.

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[101] By art 15.1 the licensor was permitted to terminate the licence agreement forthwith by written notice, under para (d), if the licensee failed to comply with the obligation described in art 9.7.

- A [102] Having these provisions in mind, when the plaintiff found that the defendant had contravened art 9.7, the plaintiff proceeded to invoke the provisions of art 15.1(d) to terminate the agreement forthwith.
- B [103] In these circumstances, the defendant, irrespective of any Anton Piller orders which the plaintiff may have sought in aid of the notice of termination, was required to comply with such notice.
- C [104] Learned counsel for the defendant argued strenuously that the defendant had a right under art 15.6(e) to continue selling off stocks for six months, ie from 1 January 1997 to 30 June 1997, as provided for in that article.
- D [105] With respect, this right for the licensee to sell off such stocks within six months can only arise in two situations: one, where the licence had expired by effluxion of time. In other words, if it had come to an end on 31 December 1996. However, it is my finding of fact, as mentioned earlier as well, that the licence agreement, the third licence agreement, inured beyond 31 December 1996 up to its termination on 19 June 1997.
- E Therefore, the licensee, or the defendant as licensee, did not have the right to sell off the stocks for those six months.
- F [106] The other right of the defendant as licensee to sell off the stocks for six months would only arise if the licensee itself, ie the defendant, terminated the licence. Here the defendant did not terminate the licence, as one may refer back to what I had said earlier, where DW1, Data' Gill, had informed the plaintiff that if the plaintiff found anything wrong, '... you could fire us'. So there was no question of the defendant terminating the licence.
- G [107] During the course of proceedings, parties were a little puzzled as to what the phrase 'except exclusivity' meant in art 15.6(e). Having studied the agreement in detail, I am of the view that that phrase simply means this: That where the defendant as licensee exercised a right where the licence had expired to sell off the stocks for six months from the expiry, or where the defendant had itself terminated the licence, and continued to sell the stocks for six months, the defendant could do so, but it failed to enjoy exclusivity in the territory of selling the licensed products in those circumstances.
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- I [108] This would be in consonance with the agreement, because, then the licence agreement would have come to an end and the plaintiff as licensor must be at liberty to look for other parties to step into the shoes of the licensee, in the event that the plaintiff decided to have this agreement continue with other parties.

[109] In the course of the trial DW1, Dato' Gill, also said, I believe during cross-examination, something to the effect that someone in the plaintiff company during one of his visits to Japan had told him an over-the-counter sale was permissible. This was not stated in very categorical terms. From his demeanour, I noticed that he was very, hesitant in stating this. But should it be so, then a contemporaneous document should have been forthcoming from the defendant to say that the plaintiff itself had allowed for such a thing, and if at all, it was to contend so, then the full scenario should have been given as to the purchase by Isaac Leung, or a situation like that, for the plaintiff to have agreed. Because the agreement shows that in most of the instances under the agreement, if anything is to be done, it is to be done in writing. Therefore, it cannot be envisaged that the plaintiff would willingly agree to an exception to be made to the prohibition against exportation out of the territory, as proscribed in art 9.7, merely by word of mouth.

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[110] I go on to say that in civil cases the burden of proof is on a balance of probabilities. It is not proof beyond a reasonable doubt. Learned counsel for the defendant at times proceeded at length to cross-examine witnesses on matters which had already been agreed upon in the agreed facts, but I gave him sufficient latitude when he assured me that he was reaching the matter in point. Particularly in relation to the goods which were sent to Hong Kong, his cross-examination was very lengthy. To my mind that was a waste of time because it was never in dispute between the parties that the goods did go to Hong Kong. This case is not a criminal case where you have to have a chain of evidence and you have to prove an unbroken chain of evidence.

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[111] Perhaps, with respect to Mr Jagit Singh, he brought his experience in the criminal law sphere into the civil proceedings sphere and was proceeding to the extent that he wanted the plaintiff to prove everything to the hilt. That is not the standard of proof that is applicable in civil proceedings.

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[112] The fact that any of the witnesses, and here I state general principles which I have borne in mind in coming to a decision, that a witness is unshakeable in cross-examination or has been unshaken in cross-examination, is not an acid test of credibility. What is important is whether the evidence of that witness is acceptable, having the full matrix of the facts and the documents in mind, and whether that witness' evidence is credible or not. This observation applies with equal force to witnesses for the plaintiff as well as for the defendant.

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[113] I have embarked upon an examination of the evidence with this principle in mind, besides, of course, other principles which are applicable.

A [114] For all the foregoing reasons, I find for the plaintiff in this action, with costs being awarded against the defendant. I dismiss the defence and the counterclaim with costs.

B *Appeals dismissed with costs.*

Reported by Andrew Christopher Simon

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